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MAY 10 2005

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKABy 2:53 Deputy

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**UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

CLARENCE ABELDGAARD,
OCEANVIEW ENTERPRISES, INC.,
CLOYD MOSER and MODEB
INVESTMENTS,

Defendants.

Case No. A-01-378 Civil (RRB)

**NOTICE OF LODGING OF
 PROPOSED CONSENT DECREE
 WITH DEFENDANTS CLOYD
 MOSER AND MODEB
 INVESTMENTS**

Plaintiff United States of America with this notice lodges with the Court a proposed consent decree that contains the terms of a proposed settlement of the claims asserted by the United States against Cloyd Moser and Modeb Investments in the First Amended Complaint,

filed in July, 2002. The proposed consent decree does not address claims against Clarence Abeldgaard or Oceanview Enterprises, Inc.

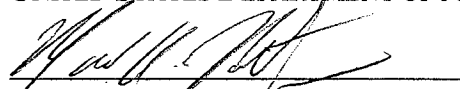
In this case, the United States filed suit against Mr. Moser and Modeb Investments under Sections 309(b) and (d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(b) and (d), to obtain injunctive relief and civil penalties for the discharge of pollutants into waters of the United States located at three subdivisions near Anchor Point Alaska without the required CWA permits or authorizations, in violation of CWA section 301(a), 33 U.S.C. § 1311(a).

The United States, Mr. Moser and Modeb Investments have reached a proposed settlement of these claims, which takes the form of a proposed consent decree. A copy of the proposed consent decree is attached to this notice as Exhibit A and hereby lodged with the Court.

The proposed consent decree should not be signed or entered by the Court at this time. Pursuant to the requirements of 28 C.F.R. § 50.7, the proposed consent decree should not be entered by the Court until after the Department of Justice provides an opportunity to persons who are not named as parties to the action to comment on the proposed consent decree. Id. The Department of Justice will receive and consider any written comments relating to the proposed consent decree. It will then make an appropriate motion to the Court and file the comments with the Court. Id.

Respectfully submitted,

KELLY A. JOHNSON
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UNITED STATES DEPARTMENT OF JUSTICE


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Attorneys for Plaintiff United States

CERTIFICATE OF SERVICE

I hereby certify that on this ^{14th} 3d day of May, 2005, I served a true copy of the foregoing **NOTICE OF LODGING OF PROPOSED CONSENT DECREE WITH DEFENDANTS CLOYD MOSER AND MODEB INVESTMENTS** and the **CONSENT DECREE WITH DEFENDANTS CLOYD MOSER AND MODEB INVESTMENTS** by the method indicated below, postage prepaid, addressed to the following persons:

Lawrence V. Albert
P.O. Box 200934
Anchorage, AK 99520

☐ Via Facsimile (907) 349-7602
☐ Via Overnight Mail (907) 272-2008
☒ Via US Postal Service
☐ Via Hand Delivery

C.E. Abeldgaard
Oceanview Enterprises, Inc.
P.O. Box 891
Homer, Alaska 99603

☐ Via Facsimile
☐ Via Overnight Mail
☒ Via US Postal Service
☐ Via Hand Delivery

Gailin Herman

~~CONFIDENTIAL~~

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**UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

**CLARENCE ABELDGAARD,
OCEANVIEW ENTERPRISES, INC.,
CLOYD MOSER and MODEB
INVESTMENTS,**

Defendants.

Case No. A-01-378 Civil (RRB)

**CONSENT DECREE WITH
DEFENDANTS CLOYD MOSER AND
MODEB INVESTMENTS**

WHEREAS, the Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), filed the First Amended Complaint in this matter on July 30, 2002, adding Defendants Cloyd Moser and Modeb Investments (collectively, "Defendants," and each of the Defendants may be referred to individually as "Defendant");

WHEREAS, the First Amended Complaint alleges, inter alia, that Defendants violated Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States located at three subdivisions near Anchor Point Alaska – Stariski Meadows, Piper's Haven and the Happy Valley 5 Acre Homesites ("the Site") – without authorization by the United States Department of the Army ("the Corps");

WHEREAS, the First Amended Complaint seeks, inter alia, to: (1) enjoin the discharge of pollutants into waters of the United States in violation of CWA Section 301(a), 33 U.S.C. § 1311(a); (2) require Defendants, at their own expense and at the direction of EPA, to restore and/or mitigate the damages caused by their unlawful activities; and (3) require Defendants to pay civil penalties as provided in 33 U.S.C. § 1319(d);

WHEREAS, by Order dated August 21, 2003, the Court granted the United States' Motion for Partial Summary Judgment and found, in relevant part, that Defendants are liable under the CWA for certain road construction on or near Sergeant Avenue identified as site 6L;

WHEREAS, the Plaintiff, the United States of America, on behalf of EPA, filed the Complaint in this matter against Clarence Abeldgaard and Oceanview Enterprises, Inc. on December 21, 2001;

WHEREAS, this Consent Decree addresses only the United States' claims in the First Amended Complaint against the Defendants and no provision of this Consent Decree is intended to provide any benefit to, relieve any obligation or liability of, or resolve any claims against Clarence Abeldgaard or Oceanview Enterprises, Inc.;

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' claims under the CWA set forth in the First Amended Complaint against the Defendants regarding the Site;

WHEREAS, the United States and Defendants agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the United States' claims under the CWA against Defendants in this case; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the United States' claims against Defendants in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law;

THEREFORE, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of these actions and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and CWA Section 309(b), 33 U.S.C. § 1319(b).

2. Venue is proper in the District of Alaska pursuant to 28 U.S.C. §§ 1391(b) and (c), and CWA Section 309(b), 33 U.S.C. § 1319(b). The subject property is located in this District, the causes of action against Defendants arose in this District and Defendants reside in and conduct business in this District.

3. The Complaint states claims upon which relief can be granted pursuant to CWA Sections 301, 309, 402 and 404, 33 U.S.C. §§ 1311, 1319, 1342 and 1344.

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon Defendants, their officers, directors, agents, employees and servants, and their successors and assigns and any person, firm, association or corporation who is, or will be, acting in concert or participation with any of the Defendants whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against one or both Defendants, neither of the Defendants shall raise as a defense the failure of any of its officers, directors, agents, employees, successors or assigns, or any person, firm or corporation acting in concert or participation with one or both Defendants, to take any actions necessary to comply with the provisions hereof.

5. The transfer of ownership or other interest in any portion of the Site shall not alter or relieve Defendants of their obligation to comply with all of the terms of this Consent Decree. At least fifteen (15) days prior to the transfer of ownership or other interest in any portion of the Site, the party making such transfer shall provide written notice and a true copy of this Consent Decree to its successors in interest and shall simultaneously notify the United States at the addresses specified in paragraph 56 below that such notice has been given. As a condition to any such transfer, the Defendant making the transfer shall reserve all rights necessary to comply with the terms of this Consent Decree.

III. SCOPE OF CONSENT DECREE

6. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the First Amended Complaint against the Defendants under CWA Section 301, 33 U.S.C. § 1311, concerning the Site.

7. It is the express purpose of the parties in entering this Consent Decree to further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251. All plans, studies, construction, remedial maintenance, monitoring programs and other obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing Defendants to achieve and maintain full compliance with, and to further the purposes of, the CWA.

8. Defendants' obligations under this Consent Decree are joint and several.

9. Except as in accordance with this Consent Decree, Defendants and Defendants' agents, successors and assigns are enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

10. The parties acknowledge that Nationwide Permit 32, 67 Fed. Reg. 2020 (Jan. 15, 2002), authorizes the discharge of dredged or fill material insofar as such discharge is necessary to complete the work required to be performed pursuant to this Consent Decree. Any such discharge of dredged or fill material necessary for work required by this Consent Decree shall be subject to the conditions of the Nationwide Permit and this Consent Decree.

11. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to CWA Sections 402 or 404, 33 U.S.C. § 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the Corps to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit. Nothing in this Consent decree shall limit EPA's ability to exercise its authority pursuant to CWA Section 404(c), 33 U.S.C. § 1344(c), or limit EPA's ability to issue, modify, suspend, revoke or deny any individual or general National Pollutant Discharge Elimination ("NPDES") permit.

12. This Consent Decree in no way affects or relieves Defendants of their responsibility to comply with any applicable federal, state, or local law, regulation or permit.

13. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

14. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

15. Nothing in this Consent Decree shall constitute an admission of fact or law by any party.

IV. CIVIL PENALTIES

16. Defendants shall pay a civil penalty to the United States in the amount of TWELVE THOUSAND FIVE HUNDRED dollars (\$12,500), within 30 days of entry of this Consent Decree.

17. Defendants shall make the above-referenced payment by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance

with current electronic funds transfer procedures, referencing U.S.A.O. file number 2001V00226, EPA Region X and the DOJ case number 90-5-1-1-16195. Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's Office for the District of Alaska. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

18. Upon payment of the civil penalty required by this Consent Decree, Defendants shall provide written notice to the United States, at the addresses specified in paragraph 56 of this Consent Decree, that such payment was made in accordance with paragraph 17 above.

19. Civil penalty payments pursuant to this Consent Decree (including stipulated penalty payments under Section VIII) are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

V. INJUNCTIVE RELIEF - RESTORATION

20. Defendants shall perform the restoration under the terms and conditions stated in Appendix A appended hereto and incorporated herein by reference.

21. Upon completion of the terms and conditions of Appendix A, Defendants shall not mow, cut, clear, cultivate, dredge, excavate, farm, fill, dewater, drain or otherwise disturb in any manner whatsoever any location identified in Appendix A, except as approved by EPA.

VI. SUPPLEMENTAL ENVIRONMENTAL PROJECT - ESTABLISHMENT OF PERMANENT WETLAND CONSERVATION AREA

22. Defendants shall complete the following supplemental environmental project

("SEP"), which the parties agree is intended to secure significant environmental protection and improvements. The cost to Defendants of implementing this SEP shall exceed \$205,000, including: (a) the assessed value of transferred land; (b) any costs paid by Defendants associated with effectuating the transfer and permanent conservation easements discussed below; and (c) any costs paid by Defendants associated with creating an endowment for purposes of managing the land within the permanent wetland conservation area discussed below.

23. Not more than ninety (90) days after entry of this Consent Decree, Defendants shall transfer the fee simple interest in Stariski Meadows subdivision lots 15, 16, 19 through 33, 37, 46 and 47 to the Kachemak Heritage Land Trust ("KHLT"), and shall ensure that permanent deed restrictions preventing the impairment of or interference with the conservation and water quality values of those lots become effective upon the transfer of the lots to KHLT. The transfer and permanent deed restrictions shall be acceptable to the United States. In addition, Defendants shall ensure that, not more than ninety (90) days after entry of this Consent Decree, KHLT's Board of Directors passes a resolution providing that, if KHLT ceases to retain ownership of any of the lots, KHLT will ensure that, upon transfer of the lots to a new owner, KHLT or a similar conservation organization shall receive permanent conservation easements on the transferred lots. The KHLT Board of Directors' resolution shall be acceptable to the United States.

24. Not more than ninety (90) days after entry of this Consent Decree, Defendants shall ensure that permanent conservation easements to KHLT become effective on the wetland portions of Stariski Meadows subdivision lots 17, 18 and 45, as depicted on the map attached hereto as Appendix B. The permanent conservation easements shall be acceptable to the United States.

25. The purpose of the transfer of land, permanent deed restrictions and permanent conservation easements discussed in paragraphs 23-24 above shall be to establish a wetland conservation area. The transfer, permanent deed restrictions and permanent conservation easements discussed in paragraphs 23-24 above shall ensure that the land within the permanent wetland conservation area remains in its natural condition in perpetuity, and shall prevent any use of the land that will impair or interfere with its conservation and water quality values.

Defendants shall ensure that adequate funds are provided for KHLT to manage the land in order to achieve the purpose of the transfer, permanent deed restrictions and permanent conservation easements, and to preserve the conservation and water quality values of the land. However, Defendants are not themselves required to provide such funds; Defendants may make arrangements for another entity to provide some or all of those funds. Notwithstanding the foregoing, nothing in this paragraph shall relieve Defendants of the obligation to expend a minimum of \$205,000 to implement the SEP.

26. Defendants shall cooperate fully with KHLT regarding the requirements for the transfer of land, permanent deed restrictions and permanent conservation easements discussed in paragraphs 23-24 above.

27. Within sixty (60) days of entry of this Consent Decree, Defendants shall submit to the United States, for review and comment, copies of any documents ("SEP Documents") required for the transfer of land, permanent deed restrictions and permanent conservation easements discussed in paragraphs 23-24 above, including, at a minimum: (1) the survey, including a metes and bounds legal description, of the properties subject to the permanent conservation easements; (2) the statutory warranty deeds for each of the properties to be

transferred to KHLT subject to permanent deed restrictions; and (3) the permanent conservation easements. EPA shall provide comments to Defendants regarding any alleged errors in and/or omissions from the SEP Documents within twenty (20) days of receipt of the SEP Documents from Defendants. Defendants shall then incorporate EPA's comments in the SEP documents, and accomplish the transfer of land and ensure the effectiveness of the permanent conservation easements in accordance with paragraphs 23-24 above.

28. With regard to the SEP, Defendants certify the truth and accuracy of each of the following:

- a. that all cost information provided to EPA in connection with EPA's approval of the SEP is complete and accurate and represents a fair estimate of the costs necessary to implement the SEP;
- b. that, as of the date of executing this Consent Decree, Defendants are not required to perform or develop the SEP by any federal, state, or local law or regulation and are not required to perform or develop the SEP by agreement, grant, or as injunctive relief awarded in any other action in any forum;
- c. that the SEP is not a project that Defendants were planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this Consent Decree;
- d. that Defendants have not received, and are not negotiating to receive, credit for the SEP in any other enforcement action; and
- e. that Defendants will not receive any reimbursement for any portion of the SEP from any other person.

29. Defendants shall submit a SEP Completion Report to the United States no later than October 1, 2005 that contains the following information:

- a. a detailed description of the SEP as implemented;
- b. a description of any problems encountered during the project and the solutions thereto;
- c. itemized costs expended on the project; and
- d. certification in accordance with paragraph 37 below that the SEP has been fully implemented pursuant to paragraphs 22-27 above.

30. In order to determine the adequacy of SEP completion or eligibility of SEP costs, the United States may, in its sole discretion, require information in addition to that described in the preceding paragraph. Defendants shall provide such information.

31. After receiving the SEP Completion Report, the United States will notify Defendants, in writing, whether or not Defendants have satisfactorily completed the SEP. If the SEP has not been completed satisfactorily in accordance with the SEP description above, or if the amount expended on performance of the SEP is less than the amount set forth in paragraph 22 above, Stipulated Penalties may be assessed under Section XII of this Consent Decree.

32. Any public statement, oral or written, in print, film, or other media, made by Defendants making reference to the SEP shall include the following language, "This project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency under the Clean Water Act."

33. Upon entry of this Consent Decree, Defendants shall not mow, cut, clear,

cultivate, dredge, excavate, farm, fill, dewater, drain or otherwise disturb in any manner whatsoever any of the land within the permanent wetland conservation area discussed in paragraphs 23-24 above, except as approved by EPA.

VII. RECORDING OF CONSENT DECREE

34. Defendants shall, within fifteen (15) days of entry of this Consent Decree, record a certified copy of this Consent Decree in the Homer Recording District, Third Judicial District, State of Alaska so that, thereafter, each deed, title, or other instrument conveying an interest in any property on which or immediately adjacent to the areas where restoration work is to be performed under Appendix A, and any property subject to the permanent conservation easements discussed in paragraphs 23-24 above, shall contain a notice stating that the property is subject to this Consent Decree and shall reference the recorded location of the Consent Decree.

VIII. NOTICES AND OTHER SUBMISSIONS

35. In addition to any other notice, documentation and/or report requirements in this Consent Decree, within thirty (30) days after the deadline for completing any task set forth in Appendix A of this Consent Decree, Defendants shall provide the United States with written notice, at the addresses specified in paragraph 56 of this Consent Decree, of whether or not that task has been completed.

36. If the required task has been completed, the notice shall specify the date when it was completed, and explain the reasons for any delay in completion beyond the scheduled time for such completion required by the Consent Decree.

37. In all notices, documents or reports submitted to the United States (including EPA and/or the Department of Justice) pursuant to this Consent Decree, the Defendants shall certify such notices, documents and reports as follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

(Signature) _____

(Name Typed or Printed)

(Title) _____

IX. RETENTION OF RECORDS AND RIGHT OF ENTRY

38. Until five (5) years after entry of this Consent Decree, Defendants shall preserve and retain all records and documents now in their possession or control or which come into their possession or control that relate in any manner to the performance of the tasks in Appendix A, regardless of any personal or partnership retention policy to the contrary. Defendants shall also instruct their contractors and agents to preserve all documents, records, and information of

whatever kind, nature, or description relating to the performance of the tasks in Appendix A until five (5) years after entry of this Consent Decree.

39. At the conclusion of the document retention period, Defendants shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States, Defendants shall deliver any such records or documents to EPA. The Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Defendants assert such a privilege, they shall provide the United States with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

40. Until termination of this Consent Decree, the United States and its authorized representatives and contractors shall have authority at all reasonable times to enter the Defendants' premises to:

- a. Monitor the activities required by this Consent Decree;
- b. Verify any data or information submitted to the United States;
- c. Obtain samples;
- d. Inspect and evaluate Defendants' restoration and/or mitigation activities; and

- e. Inspect and review any records required to be kept under the terms and conditions of this Consent Decree and the CWA.

41. This Section of this Consent Decree is in addition to, and in no way limits or otherwise affects, the statutory authorities of the United States to conduct inspections, to require monitoring and recordkeeping, and to obtain information from Defendants as authorized by law.

X. DISPUTE RESOLUTION

42. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and Defendants affected by the dispute to attempt to resolve such dispute. The period for informal negotiations shall not extend beyond thirty (30) days beginning with written notice by one party to the other affected party or parties that a dispute exists, unless agreed to in writing by those parties. If a dispute between the United States and Defendants cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within fourteen (14) days after the end of the informal negotiations period, the Defendants file a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have thirty (30) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree and the CWA, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

43. If the United States believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the thirty (30) day period for informal negotiations. The Defendants shall have fourteen (14) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

44. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendants under this Consent Decree, except as provided in paragraph 52 regarding payment of Stipulated Penalties.

XI. FORCE MAJEURE

45. Defendants shall perform the actions required under this Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events which constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the control of Defendants, including their employees, agents, consultants and contractors, which could not be overcome by due diligence and which delays or prevents the performance of an action required by this Consent Decree within the specified time period. A Force Majeure event does not include, inter alia, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate events, changed circumstances arising out of the sale, lease or other transfer or conveyance of title or ownership or possession of a site, or failure to obtain federal, state or local permits.

46. If Defendants believe that a Force Majeure event has affected Defendants' ability to perform any action required under this Consent Decree, Defendants shall notify the United States in writing within seven (7) calendar days after the event at the addresses listed in paragraph 56. Such notice shall include a discussion of the following:

- a. what action has been affected;
- b. the specific cause(s) of the delay;
- c. the length or estimated duration of the delay; and
- d. any measures taken or planned by the Defendants to prevent or minimize the delay and a schedule for the implementation of such measures.

Defendants may also provide to the United States any additional information that they deem appropriate to support their conclusion that a Force Majeure event has affected their ability to perform an action required under this Consent Decree. Failure to provide timely and complete notification to the United States shall constitute a waiver of any claim of Force Majeure as to the event in question.

47. If the United States determines that the conditions constitute a Force Majeure event, then the deadline for the affected action shall be extended by the amount of time of the delay caused by the Force Majeure event. Defendants shall coordinate with EPA to determine when to begin or resume the operations that had been affected by any Force Majeure event.

48. If the parties are unable to agree whether the conditions constitute a Force Majeure event, or whether the length of time for fulfilling the provision of the Consent Decree at issue should be extended, any party may seek a resolution of the dispute under the procedures in Section X of this Consent Decree.

49. Defendants shall bear the burden of proving: (1) that the noncompliance at issue was caused by circumstances entirely beyond the control of Defendants and any entity controlled by Defendants, including their contractors and consultants; (2) that Defendants or any entity controlled by Defendants could not have foreseen and prevented such noncompliance; and (3) the number of days of noncompliance that were caused by such circumstances.

XII. STIPULATED PENALTIES

50. After entry of this Consent Decree, if Defendants fail to timely fulfill any requirement of the Consent Decree (including Appendix A), Defendants shall pay a stipulated penalty to the United States for each violation of each requirement of this Consent Decree as follows:

- a. For failure to pay civil penalties, complete restoration or complete SEP:
 - 1. For Day 1 up to and including Day 30 of non-compliance \$1000.00 per day
 - 2. For Day 31 up to and including 60 of non-compliance \$2,000.00 per day
 - 3. For Day 61 and beyond of non-compliance \$3,000.00 per day
- b. For failure to fulfill any other requirements of this Consent Decree, including providing notices, reports or other submissions:
 - 1. For Day 1 up to and including Day 30 of non-compliance \$500.00 per day
 - 2. For Day 31 up to and including 60 of non-compliance \$1,000.00 per day
 - 3. For Day 61 and beyond of non-compliance \$2,000.00 per day

Such payments shall be made without demand by the United States on or before the last day of the month following the month in which the stipulated penalty accrued.

51. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to the Dispute Resolution provisions in Section X and/or the Force Majeure provisions in Section XI shall be resolved upon motion to this Court as provided in paragraphs 42 and 43.

52. The filing of a motion requesting that the Court resolve a dispute shall stay Defendants' obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree. In the event that Defendants do not prevail on the disputed issue, stipulated penalties shall be paid by Defendants as provided in this Section.

53. To the extent Defendants demonstrate to the Court that a delay or other non-compliance was due to a Force Majeure event (as defined in paragraph 45 above) or otherwise prevail on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.

54. In the event that a stipulated penalty payment is applicable and not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

55. Defendants shall make the above-referenced payment by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance

with current electronic funds transfer procedures, referencing U.S.A.O. file number 2001V00226, EPA Region X and the DOJ case number 90-5-1-1-16195. Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's Office for the District of Alaska. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

XIII. ADDRESSES

56. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

As to the United States:

Mark A. Nitczynski
U.S. Department of Justice
Environmental Defense Section
999 19th Street
Ste. 945, North Tower
Denver, CO 80202
Fax: (303) 312-7331

Wetlands Enforcement Coordinator
U.S. Environmental Protection Agency, Region 10, ECO-083
1200 Sixth Avenue
Seattle, Washington 98101
attn: Steve Roy
Fax: (206) 553-1775

As to Defendants:

Lawrence Albert
P.O. Box 200934
Anchorage, Alaska 99520
Fax: (907) 243-5476

Cloyd T. Moser
Modeb Investments
425 "G" Street, Ste. 404

Anchorage, Alaska 99501
FAX: (907) 349-7602

XIV. COSTS OF SUIT

57. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action. Should Defendants subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, Defendants shall be liable for any costs or attorneys' fees incurred by the United States in any action against Defendants for noncompliance with or enforcement of this Consent Decree.

XV. PUBLIC COMMENT

58. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The Defendants agree not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified the Defendants in writing that it no longer supports entry of the Consent Decree.

XVI. CONTINUING JURISDICTION OF THE COURT

59. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During

the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

XVII. MODIFICATION

60. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by both the United States and the Defendants and approved by the Court.

XVIII. TERMINATION

61. Except for paragraphs 21 and 33, this Consent Decree may be terminated by either of the following:

- a. Defendants and the United States may at any time make a joint motion to the Court for termination of this Decree or any portion of it; or
- b. Defendants may make a unilateral motion to the Court to terminate this Decree after each of the following has occurred: (1) Defendants have obtained and maintained compliance with all provisions of this Consent Decree and the CWA for twelve (12) consecutive months; (2) Defendants have paid all penalties and other monetary obligations hereunder and no penalties or other monetary obligations are outstanding or owed to the United States; (3) Defendants have certified compliance pursuant to this subparagraph b to the Court and to the United States; and (4) within forty-five (45) days of receiving such certification from the Defendants, the EPA has not contested in writing that such compliance has been achieved. If EPA disputes Defendant's full compliance, this Consent Decree shall remain in effect pending

resolution of the dispute by the parties or the Court.

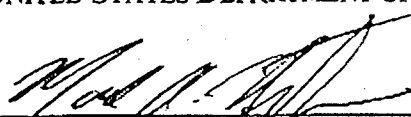
IT IS SO ORDERED.

Dated and entered this _____ day of _____, 2005.

THE HONORABLE RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

ON BEHALF OF THE UNITED STATES:

KELLY A. JOHNSON
Acting Assistant Attorney General
Environment and Natural Resources Division
UNITED STATES DEPARTMENT OF JUSTICE



MARK A. NITCZYNSKI
Environmental Defense Section
UNITED STATES DEPARTMENT OF JUSTICE
999 18th Street, Ste. 945
Denver, CO 80202
PHONE: (303) 312-7300
FAX: (303) 312-7331

Date: 5/6/05

TIMOTHY M. BURGESS
United States Attorney
District of Alaska



RICHARD L. POMEROY
Assistant U.S. Attorney

For EPA:

Date: May 9, 2005

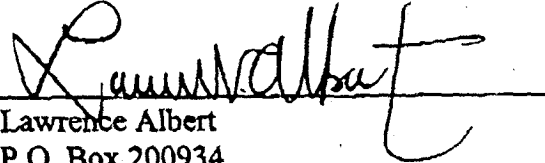
*Not
Pollution*

THOMAS V. SKINNER
Acting Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
Washington, D.C. 20460

RON KREIZENBECK
Acting Regional Administrator, Region 10
U.S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, Washington 98101

R. DAVID ALLNUTT
Assistant Regional Counsel, Region 10
U.S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, Washington 98101

FOR DEFENDANTS

A handwritten signature in black ink, appearing to read "Lawrence Albert", is written over a horizontal line.

Lawrence Albert

P.O. Box 200934

Anchorage, Alaska 99520

PHONE: (907) 243-2172

FAX: (907) 243-5476

Date: May 10 2005

APPENDIX A - RESTORATION PLAN

This document sets forth the restoration required by Defendants Cloyd Moser and Modeb Investments (collectively, "Defendants") under this Consent Decree With Cloyd Moser and Modeb Investments ("Consent Decree"). The terms of this Appendix, including the attached photos (Photos 1-10) and all drawings referred to herein, are incorporated into and set forth binding provisions of the Consent Decree. This restoration shall be carried out in accordance with all of the terms of the Consent Decree, including the terms set forth below in this document. The restoration work required under this Restoration Plan and the Consent Decree shall not be considered to be completed unless and until all of the Success Criteria are met for each location.

I. PEPPER ROAD-- VIOLATION SITE 7L

A. *Location:* This location is identified as Violation Site 7L in Supplement 1, "Documentation of Violation in the Stariski Meadows, Happy Valley, and Piper's Haven Subdivisions, Stariski Creek Watershed, Kenai Peninsula Borough, State of Alaska" (hereafter "Supplement 1") to the January 15, 2003, report completed by L.C. Lee & Associates, Inc., entitled "Analysis of the Geographic Extent and Impacts to Waters of the United States, Including Wetlands in the Stariski Meadows, Happy Valley, and Piper's Haven Subdivisions, Stariski Creek Watershed, Kenai Peninsula Borough, Alaska" (hereafter "Geographic Extent Report").^{1/} This site is addressed in detail on pages 14-15 of Supplement 1.

The GPS coordinates for the northern boundary of the wetlands where work is to be performed are: 0572119E; 6641837N.^{2/} See Photo 1 attached hereto. The coordinates for the north end of Pepper Road are: 0572122E; 6640315N. The GPS coordinates for the northernmost of two unnamed tributaries that Pepper Road crosses, where a box culvert is to be replaced, are: 0572021E; 6641416N. The GPS coordinates for the southern boundary of the wetlands where work is to be performed are: 0571799E; 6640649N. See Photos 2-3 attached hereto (showing L.C. Lee & Associates' survey marker with pink wetlands delineation survey tape and view north of Pepper Road from southern boundary where work is to take place). The length of Pepper Road where work is to be performed is approximately 4,300 feet.

B. *Concerns/Problems to be addressed:* The hydrologic conditions of the slope wetland in this location have been altered and should be restored to the extent possible given that the road will remain in place. The improper road and ditch construction, including the absence of adequate culverting, has led to excessive sedimentation and erosion. The "box" culvert where Pepper Road crosses the northernmost unnamed tributary is undersized, will not sufficiently transmit seasonal high flows, causes excessive sedimentation and erosion in the stream and impedes adult and juvenile fish movement.

^{1/} The Geographic Extent Report, including Supplement 1, was produced to the Defendants by the United States in this litigation.

^{2/} The datum for the GPS unit used in establishing the coordinates included in these specifications is WGS 84, which will allow for reference to the Kenai Peninsula Borough's GPS data. The zone is 05V.

C. *Goals of the restoration:* Restore the shallow subsurface flow of the water through the slope wetland. Minimize sedimentation and erosion from the ditches on the east (upslope) side of Pepper Road. Replace the box culvert on the northernmost unnamed tributary with a properly sized and installed culvert that transmits high flows, minimizes sedimentation and erosion, and does not impede fish travel.

D. *Description of work to be performed:*

1. *Culverting throughout length of Pepper Road where work is to be performed:* High density polyethylene ("HDPE") culverts, 12 inches or larger inside diameter ("ID"), are to be placed at an average of 100 foot intervals. The placement of the culverts may be varied slightly from 100 feet where necessary to address areas with relatively greater flows (which will require culverts to be spaced at less than 100 foot intervals) or lesser flows (where spacing at greater than 100 foot intervals is appropriate).

Construction and installation shall proceed according to Geographic Extent Report, Appendix L, Drawing D-6 "Road Culvert Cross Section." Defendants shall ensure that their contractor is provided with a copy of that drawing. The culverts should extend beyond the width of the road prism but should not be so long as to allow the culverts to "bow" in the middle. The general recommendation is 2 feet to 4 feet of exposed culvert on the downslope (west) side of the road. Defendants' contractor shall work in the field with a representative of the United States ("U.S. rep") to determine the optimal length of culvert that is exposed beyond the road prism.

Each culvert shall be placed on geotextile cloth, Mirifi 700 or equivalent. The culvert shall be covered with a minimum of 2 feet of mineral soil material. This mineral soil cover material shall be equivalent to the type and specification as the fill present on Pepper Road.

Defendants shall be responsible for procuring the mineral soil cover material necessary to complete this work. If the placement of 2 feet of mineral soil material over any culvert will result in mounding above the surrounding road surface, the road shall be graded so that there is a smooth, durable transition over each culvert.

On the downslope (west) side of each culvert, a rock apron shall be placed at the culvert outfall. Angular rock 4 inches to 8 inches in diameter shall be laid in a concave shape at the downslope outfall of each culvert. If angular rock is not available, then sub-angular or round rock of comparable size shall be used. The volume of rock at each apron shall be approximately one cubic yard. The rock apron shall be compacted into the ground with one or more bucket downstrokes.

Because the surrounding topography is nearly level, it may be necessary to direct flows within roadside ditches to the appropriate culverts by using plugs or check dams constructed of earth, rock or a combination of the two. Approximate design specifications for a rock check dam are shown in the Geographic Extent Report, Appendix L, Drawing D-1. Defendants shall ensure that their contractor is provided with a copy of that drawing. Defendants' contractor shall work in the field with a U.S. rep to determine the optimal construction method and location for the

plugs or check dams.

2. *Recontouring of Ditch Next to Pepper Road:* To facilitate water flow through the culverts, a ditch on the east side of Pepper Road shall remain. The ditch will collect the water flow and distribute it to the culverts. The ditch on the east side of Pepper Road shall be as shallow as possible (*i.e.*, approximately one to two feet). Excessive depth and the resulting erosion of soil from water flow (and associated energy) shall be avoided. To re-contour the ditch, the existing ditch shall be "smoothed" with a trackhoe bucket so as to smooth and compact the ditch and allow for proper water flow in the ditch.

In certain locations, the bottom elevation of the ditch is too low, that is, it is lower than the invert elevation of the culverts to be installed. Consistent with the requirement that ditches be as shallow as possible, lengths of ditch where the bottom elevation is too low shall be partially filled to achieve the appropriate bottom elevation. The fill shall come from the material sidecast from the original excavation and located adjacent to the ditch. (That sidecast material is now covered with grasses in some places.)

3. *Removal/Filling of "second" ditch:* In some locations a second ditch has been created generally parallel to the main roadside ditch. Only a single ditch, next to the upslope (east) side of Pepper Road, is appropriate. Wherever a second ditch exists, it shall be backfilled to restore that area to its original elevation and slope. The fill shall come from the material sidecast from the original excavation and located adjacent to the ditch. (That sidecast material is now covered with grasses in some places). In this way, the second ditch shall be eliminated from all locations.

The ditch area to be filled shall be revegetated through re-seeding. Specifications for the seed mix are set forth in the Geographic Extent Report, Appendix L, Drawing D-2 "Seed Mix." Defendants shall ensure that their contractor is provided with a copy of that drawing. Hydroseeding is preferable if the equipment is available.

A substitute seed mix - that is, one other than the one set forth in the Geographic Extent Report, Appendix L, Drawing D-2 "Seed Mix" - will be considered if the specified seed mix is not available locally. The general criteria for the seed mix are:

- a) Low cost;
- b) Able to become established under the site conditions;
- c) Readily available;
- d) Suitable for wetlands environment;
- e) Species must be native to Stariski Creek area;
- f) A certified weed free mix.

If a substitute seed mix is proposed by Defendants' contractor, then the plant species and proportions of mix shall be described in detail and must be approved by the United States before use. If a substitute seed mix will be proposed, Defendants should consult with local experts regarding the appropriate seed mix.

4. *Replacement of the "box" culvert at the northernmost unnamed tributary on Pepper Road:* Approximately 1,500 feet south of the northern terminus of Pepper Road, a wood "box" culvert has been constructed across Pepper Road to direct flow beneath Pepper Road from the northernmost of the two unnamed tributaries of Stariski Creek that cross Pepper Road. The two Stariski Creek tributaries that Pepper Road crosses are depicted in the "Overview of Impacts" page of Supplement 1. The culvert is of wood construction, is covered with fill, and grasses are overgrowing it on the road slope. The GPS coordinate data for this location are: 0572021E; 6641416N.

The wood box culvert shall be replaced with 36" ID HDPE culvert. The culvert shall be bedded in 3/4 inch clean rock/gravel prior to installation. Also, the bottom interior surface of the culvert shall be covered with native cobble and gravel from the adjacent stream reach, adequate to facilitate adult and juvenile fish movement. Defendants' contractor shall be responsible for receiving assurance in the field from a U.S. rep that the bottom interior of the culvert is properly covered.

This unnamed tributary provides fish habitat for adult and juvenile salmonids and other species. Construction activity that may affect fish habitat must occur within approved Alaska Department of Natural Resources/Dept. of Fish & Game ("DNR") construction windows. The fish habitat construction windows may be May 15 - July 15. Defendants shall verify the construction windows, obtain any required DNR permit and comply with all DNR construction windows and other requirements for construction activity at this location.

5. *Seeding and Bank Stabilization Work:* The seeding work described in I.D.3 above is the only seeding required as part of the work along Pepper Road. In addition, it currently is anticipated that bank stabilization likely will not be required along Pepper Road because the surfaces and slopes are sufficiently flat, and slope erosion should not be an issue. Defendants' contractor, however, shall work in the field with a U.S. rep to determine whether (and if so, what type of) bank stabilization is required, and to accomplish that bank stabilization (if any).

E. *Success Criteria:* Restoration at this location will be considered successful if the following criteria are met.

1. By August 15, 2005, culverts and plugs or check dams must be properly installed in accordance with the specifications set forth in I.D.1 above.

2. By August 15, 2005, the existing ditch next to Pepper Road must be properly recontoured in accordance with the specifications set forth in I.D.2 above.

3. By August 15, 2005 the "second" ditch must be properly removed or filled in accordance with the specifications set forth in I.D.3 above, and the reseeding and revegetation must be completed in accordance with those specifications. In addition, by August 15, 2006, that area of the second ditch must have 75 percent areal (canopy) coverage by plant species native to the Stariski Creek area and there must be no signs of erosion from that area of the ditch. If these percent coverage and erosion criteria are not met by August 15, 2006, then the reseeding and

revegetation shall be repeated until the criteria are met one year from completion of the most recent reseeding and/or revegetation.

4. By August 15, 2005, the "box" culvert at the northernmost unnamed tributary on Pepper Road must be properly replaced in accordance with the specifications set forth in I.D.4 above.

5. By August 15, 2005, bank stabilization work (if any) that a U.S. rep. determines in the field to be necessary must be completed properly in accordance with specifications determined in the field.

II. SERGEANT AVENUE EXTENSION--VIOLATION SITE 6L

A. *Location:* This site is identified as Violation Site 6L in Supplement 1, pages 12-13. Photos 4-6 attached hereto generally show the area of Sergeant Avenue Extension to be removed. Photos 3-5 were taken at the same location near the western limit of wetlands at this restoration location.

No existing L.C. Lee & Associates' wetland delineation markers were found for the area during the parties' joint site visit on May 13, 2004. During that site visit, new stakes were placed on the north and south shoulders of the road marking the "limit of work area" for the restoration work at this location. See Photos 4-6. These stakes approximate the western boundary of the wetlands at this location but are not necessarily precise wetland boundaries. At the location of Photos 4-6, the wetland begins just east of the spruce stand abutting Sergeant Avenue Extension on the south side of the road. The eastern terminus of the fill is approximated by the pile of fill material shown in Photo 5. The GPS coordinates for the east end of Sergeant Avenue Extension are: 571540E 6639872N. The road fill to be removed is approximately 550 feet in length.

B. *Concerns/Problems to be addressed:* The road has been built in wetlands at this location and has eliminated all wetland functions where fill has been placed.

C. *Goals of the restoration:* Remove the road fill and restore the area to its prior wetland state, including vegetation, and restore all prior wetland functions.

D. *Description of work to be performed:*

1. *Road Fill Removal Work:* The existing road fill shall be removed and disposed off site. Ponding of water shall be minimized. Defendants shall leave in place a small quantity of mineral soil fill and mix this fill with underlying peat. (This shall be done in order to minimize ponding and to avoid leaving a ground depression, which will result if the fill is completely removed without correction.) Construction equipment shall be deployed and operated so as to minimize disturbance of underlying peat material and adjacent wetlands. Also, mixing and lofting of remaining materials with underlying peat shall provide a smooth transition to surrounding undisturbed areas.

2. *Description of Seeding and Revegetation Work:* The area where road fill is

being removed shall be revegetated through reseeding. A seed mix with a higher proportion of bluejoint (*Calamagrostis canadensis*) than the one set forth in the Geographic Extent Report, Appendix L, Drawing D-2 "Seed Mix," shall be used for this area. In addition, live willow staking (spacing shall be two feet on center) shall be used for revegetation at this location. The specification on live staking is shown in the Geographic Extent Report, Appendix L, Drawing D-4 "Cutting or Live Stake Planting Detail." Defendants shall ensure that their contractor is provided with a copy of that drawing. Additional directions for the live willow staking are set forth in the document entitled "Willow and Dogwood Stem Cutting Collection Detail," which is attached as Exhibit 1 to this Restoration Plan. Defendants shall ensure that their contractor is provided with a copy of that Exhibit.

3. *Description of Barrier Work:* Upon completion of road removal and seeding and revegetation work, a barrier shall be constructed just west of the western "limit of work area" on Sergeant Avenue Extension. The barrier shall block vehicle passage, including four wheel off road vehicles. A "tank trap," "kelly humps" or other form of mounded feature that prevents vehicle access to the restoration site shall be constructed. In addition, crisscrossed (jackstrawed) spruce logs (at least 25 feet long and 12 inches in diameter at the base) or some equivalent barrier straddling or just west of the mounded feature shall be constructed and left in place as a barrier.

Notice: During the parties' joint site visit on May 13, 2004, the entrance to Sergeant Avenue Extension was blocked by an Allis Chalmers bulldozer. Defendants shall be responsible for making arrangements to access this restoration location, including, if necessary, arranging for removal of this equipment.

E. *Success Criteria:* Restoration at this location will be considered successful if the following criteria are met:

1. By August 15, 2005, the road fill removal work must be properly completed in accordance with the specifications set forth in II.D.1 above.

2. By August 15, 2005 the area where road fill is being removed must be properly revegetated through reseeding in accordance with the specifications set forth in II.D.2 above. In addition, by August 15, 2008: (a) 75 percent of the staked willows must be alive and established; and (b) that area must have 75 percent areal (canopy) coverage by plant species native to the Stariski Creek area (including the staked willows). If these percent criteria are not met by August 15, 2008, then the reseeding, revegetation and/or willow staking shall be repeated until the criteria are met three years from completion of the most recent reseeding, revegetation and/or willow staking.

3. By August 15, 2005, a barrier that blocks vehicle passage must be properly constructed just west of the western "limit of work area" in accordance with the specifications set forth in II.D.3 above.

III. ROWAN CIRCLE--VIOLATION SITE 1L(b)

A. *Location:* This site is identified as Violation Site 1L(b) in Supplement 1, pages 2-3. Photos 7-10 attached hereto show the location of Rowan Circle that is the subject of this restoration work. The northern terminus of the road (a cul-de-sac) is not visible in these pictures. The restoration work shall commence at the northern boundary of Lot 14 (which lies to the west of Rowan Circle) and continues to the northern terminus of the road. A stake marking the northern boundary of Lot 14 abutting on Rowan Circle is visible in Photo 7. Hence, the limit of work area can be readily determined from the lot markers abutting on Rowan Circle.

B. *Concerns/Problems to be addressed:* The road has been built in wetlands at this location and has eliminated all wetland functions where the fill has been placed.

C. *Goals of the restoration:* Remove the road fill and restore the area to its prior wetland state, including vegetation, and restore all prior wetland functions.

D. *Description of work to be performed:* The fill removal, seeding and revegetation, and barrier construction at this location shall be performed according to the specifications and guidance provided above for Sergeant Avenue Extension (site 6L).

In addition, the existing ditch on the east shoulder of Rowan Circle shall be filled and removed according to the specifications and guidance provided above for removal/filling of the second ditch near Pepper Road in I.D.3 above. The ditch shall be restored to its original elevation and slope. The fill shall come from the material sidecast from the original excavation and located adjacent to the ditch. (That sidecast material is now covered with grasses in some places). The ditch area to be filled also shall be revegetated through reseeding according to the specifications and guidance provided above for Sergeant Avenue Extension (site 6L).

The ditch south of the restoration area shall be plugged, using a plug or check dam constructed of earth, rock or a combination of the two, at the southern terminus of the work area at this location (which is the northern boundary of Lot 14). Approximate design specifications for a rock check dam are shown in the Geographic Extent Report, Appendix L, Drawing D-1. Defendants shall ensure that their contractor is provided with a copy of that drawing. Defendants' contractor shall work in the field with a U.S. rep to determine the optimal construction method for the plug or check dam.

E. *Success Criteria:* Restoration at this location will be considered successful if the following criteria are met:

1. By August 15, 2005, the road fill removal work must be properly completed in accordance with the specifications set forth in III.D and II.D.1 above.
2. By August 15, 2005 the area where road fill is being removed must be properly revegetated through reseeding in accordance with the specifications set forth in III.D and II.D.2 above. In addition, by August 15, 2008: (a) 75 percent of the staked willows must be alive and established; and (b) that area must have 75 percent areal (canopy) coverage by plant species

native to the Stariski Creek area (including the staked willows). If these percent criteria are not met by August 15, 2008, then the reseeding, revegetation and/or willow staking shall be repeated until the criteria are met three years from completion of the most recent reseeding, revegetation and/or willow staking.

3. By August 15, 2005, a barrier that blocks vehicle passage must be properly constructed just north of the northern boundary of Lot 14 in accordance with the specifications set forth in III.D and II.D.3 above.

4. By August 15, 2005, the existing ditch on the east shoulder of Rowan Circle must be properly removed or filled in accordance with the specifications set forth in III.D and I.D.3 above, and must be properly revegetated through reseeding in accordance with the specifications set forth in III.D and II.D.2 above. In addition, by August 15, 2008: (a) 75 percent of the willows staked must be alive and established; and (b) that area must have 75 percent areal (canopy) coverage by plant species native to the Stariski Creek area (including the staked willows). If these percent criteria are not met by August 15, 2008, then the reseeding, revegetation and/or willow staking shall be repeated until the criteria are met three years from completion of the most recent reseeding, revegetation and/or willow staking.

5. By August 15, 2005, the ditch south of the restoration must be properly plugged at the southern terminus of the work area at this location in accordance with the specifications set forth in III.D above.

IV. ISSUES APPLICABLE GENERALLY

A. *Road Right of Way and Access Considerations:* Right of way widths for the roads subject of proposed restoration work shall be verified by Defendants prior to commencement of the work. Site restoration work shall be performed within existing rights of way and/or on properties for which permission to perform the work has been obtained. Permission to access adjoining subdivision lot(s) shall not be assumed, and Defendants shall be responsible for obtaining all such permission. Title to much of the land adjoining the proposed restoration work, however, currently resides with Defendants.

B. *Vacation of Right of Way at Road Removal Locations:* The Stariski Meadows Subdivision plat included road dedications. The restoration work for Sergeant Avenue Extension and Rowan Circle entails removal of the existing roads and restoration to natural conditions. In addition, the parties have agreed that the rights of way for Sergeant Avenue Extension and Rowan Circle should be vacated. Approval from the Kenai Peninsula Borough, however, will be required to vacate the road rights of way on these dedicated roads. By October 1, 2005, Defendants shall obtain all of the necessary approvals for vacation of the Rowan Circle right of way and file the required materials with the Borough to secure approval for the vacation of the right of way. With respect to Sergeant Avenue Extension, Defendants have made efforts to obtain approval to vacate the right of way from a majority of the abutting property owners as set forth in Kenai Peninsula Borough Ordinance 20.28.050 - .060. No later than July 15, 2005, Defendants shall make additional good faith efforts to obtain approval from a majority of the abutting property owners, including sending follow-up correspondence to the owners who have

not yet responded to requests for their approval. If Defendants obtain this majority approval by August 15, 2005, Defendants shall, by October 1, 2005, file the required materials with the Borough to secure approval for the vacation of the Sergeant Avenue Extension right of way.

C. *Off-Site Disposal Areas:* Fill material removed from the site shall be disposed at a designated off-site disposal area. Defendants shall identify in advance the off-site disposal area(s) and verify that disposal of fill material at the off-site location is legal, *i.e.*, that the location does not constitute jurisdictional waters of the United States and/or that a fill permit for such location has been obtained. Defendants shall obtain advance approval from the United States for all off-site disposal.

Under certain circumstances, Defendants may dispose of fill removed from one site by placing it at another site where work is being performed. For example, fill removed from Rowan Circle or the Sergeant Avenue Extension sites may be used, if the fill consists of appropriate material, for covering culverts installed on Pepper Road. Defendants shall obtain advance approval from the United States for all such disposal.

D. *Permitting:* Defendants shall be responsible for obtaining all permits and/or authorizations applicable to the work described herein. The following permits and/or authorizations have been identified as potentially applicable to the restoration work to be performed:

- a) Kenai Peninsula Borough--construction work performed in a road right of way;
- b) Kenai Peninsula Borough--vacation of right of way associated with restoration work on Rowan Circle and Sergeant Avenue Extension;
- c) Alaska Dept. of Natural Resources/Dept. of Fish & Game--construction work in waterways (most importantly, catalogued anadromous streams) affecting fish habitat values;
- d) Alaska Dept. of Natural Resources/Dept. of Fish & Game--Stariski Creek bridge work;
- e) Kenai Peninsula Borough -- Stariski Creek bridge work;
- f) U.S. EPA Clean Water Act § 402 stormwater construction general permit for disturbance in excess of one acre;
- g) U.S. Army Corps of Engineers authorization and/or permits under Clean Water Act § 404.

The above list may not be complete. Exclusion or omission of any permits and/or any authorizations from the above list does not remove or diminish the responsibility of Defendants to obtain such permits and/or authorizations.

It is anticipated that both the Defendants and their contractor(s) will need to submit notices of intent to be covered by the Clean Water Act § 402 storm water Construction General Permit ("CGP"). Defendants acknowledge that compliance with the conditions of the Clean Water Act § 402 storm water CGP, including completing and following a storm water pollution prevention plan (often referred to as a SWPPP), is required for coverage under the CGP.

However, if the restoration qualifies for a waiver from CGP coverage under Appendix D to the CGP, defendants and their contractor may submit a waiver certification in lieu of obtaining coverage under the CGP. When the notices of intent or waiver certifications are submitted, Defendants shall contemporaneously provide a copy of the notices of intent or waiver certifications to the representatives of the United States set forth in paragraph 56 of the Consent Decree. Defendants and their contractor shall provide proof of permitting under the CGP or waiver thereof prior to commencement of work at each restoration location.

E. *Sediment/Erosion Control Due to Temporary Water Disturbance:* Restoration work at particular locations may involve disturbance of water flows. (This issue specifically was discussed in connection with the replacement of the culvert along Pepper Road for the unnamed tributary to Stariski Creek.) In such locations, the following materials (at a minimum) shall be used to minimize the water flow disturbance:

- straw bales to temporarily direct flow and absorb water
- a three inch trash pump system to divert higher volume flows
- sand bags to direct surface water flow

The specification for the trash pump system is shown on the document entitled "Trash Pump and Filter Bag System," which is attached as Exhibit 2 to this Restoration Plan. Defendants shall ensure that their contractor is provided with a copy of that Exhibit.

F. *Monitoring:* After the restoration work is completed, Defendants shall monitor the success of restoration at each restoration location at least once on or near the anniversary date of the completion of the work and at least once during each October until all Success Criteria are met at that location.

G. *Report Submissions to EPA:* Defendants shall prepare and submit a report to EPA within seventeen (17) days of the completion of the restoration work at the three locations set forth above. For each of the three locations, the report shall describe the work completed, identify any problem(s) encountered and the action(s) taken to address the problems and ensure the success of the restoration, and shall include detailed photographic documentation from fixed points and camera angles of: (i) the location immediately prior to the commencement of the restoration work; (ii) the restoration work in progress; and (iii) the completed restoration. In addition, Defendants shall prepare and submit a report to EPA within thirty (30) days of each monitoring event discussed above. For each of the three locations, the monitoring reports shall describe the condition of the location and whether the restoration has been successful to date, identify any problem(s) discovered and the action(s) taken to address the problems and ensure the success of the restoration, and shall include detailed photographic documentation from the monitoring visit at the location.

H. *Prior Notice of Work Dates and On-site Coordination:* Prior to commencement of any restoration work, Defendants shall notify EPA of the anticipated dates that the work will take place. The notice shall be provided in accordance with paragraph 56 of the Consent Decree. Defendants shall coordinate their work schedule with EPA so that a U.S. rep. may be present during the restoration work. Prior to the commencement of the restoration work, EPA will make

its best efforts to designate a U.S. rep. and provide Defendants with a telephone number or other means of promptly contacting a U.S. rep. Defendants may provide a U.S. rep. with weekly updates regarding the location, nature and progress of the restoration work. Such updates may be by telephone, fax, E-mail or United States mail. Defendants may request that a U.S. rep. inspect the restoration work prior to Defendants' submission of reports under paragraph IV.G of this Restoration Plan.

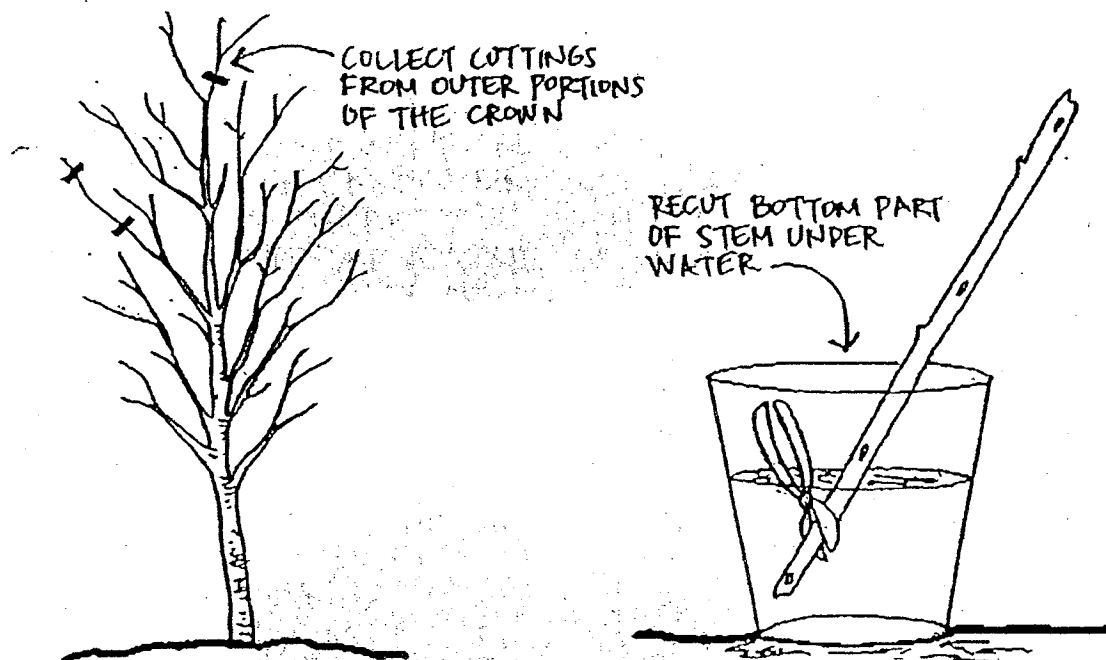
I. *Opportunity for Cure:* Provided that Defendants complete restoration at each restoration site by August 15, 2005 and submit by September 1, 2005 the report regarding the restoration required under paragraph IV.G: (a) EPA will notify Defendants by September 19, 2005 of any defects or other problems with the restoration work of which EPA is then aware; (b) Defendants shall have until October 15, 2005 to cure any such defects or other problems; and (c) stipulated penalties shall not be imposed for any such defects or other problems cured by Defendants on or before October 15, 2005. For any such defects or other problems not cured by Defendants on or before October 15, 2005, Defendants shall pay stipulated penalties accruing from August 16, 2005.

RESTORATION PLAN

EXHIBIT 1

[Willow and Dogwood Stem Cutting Collection Detail]

1. VERIFY THAT THE PLANT IS THE CORRECT SPECIES.
2. COLLECT STEM CUTTINGS FROM THE OUTER PORTIONS OF THE CROWN.
3. COLLECT CUTTINGS FROM DORMANT PLANTS THAT HAVE NOT BROKEN BUD (i.e., BUDS HAVE NOT OPENED; PLANTS DO NOT HAVE LEAVES).
4. SELECT UNBROKEN, LIVE STEMS FREE OF SIGNS OF DISEASE, INSECT INFESTATION OR PHYSICAL DAMAGE AND OTHERWISE IN SOUND AND HEALTHY CONDITION.
5. CUTTINGS MUST HAVE AT LEAST 6 LIVE NODES, AND BE AT LEAST 24" LONG AND 1/4" IN DIAMETER FOR WILLOWS (*SALIX* spp.) AND AT LEAST 18" LONG AND 1/4" IN DIAMETER FOR DOGWOODS (*CORNUS* spp.) HOLD CUTTINGS IN AT LEAST 5" OF WATER IN BUCKETS WITH THE BOTTOM ENDS OF THE CUTTING IN THE WATER.
6. WHILE THE CUTTING IS IN THE WATER, RECUT THE BOTTOM PART OF THE STEM UNDER WATER. FINAL CUTTING SIZE MUST BE AT LEAST 24" LONG AND 1/4" IN DIAMETER FOR WILLOWS, AND 18" LONG AND 1/4" IN DIAMETER FOR DOGWOODS. ALL CUTTINGS MUST HAVE AT LEAST 6 LIVE NODES.
7. HOLD CUTTINGS IN BUCKETS OF WATER WITH THE TOP ENDS POINTING UP AND THE BOTTOM ENDS IMMERSSED IN AT LEAST 5" OF WATER. USE A SEPARATE BUCKET FOR EACH SPECIES IF COLLECTING MORE THAN ONE SPECIES AT A TIME. LABEL THE BUCKET WITH THE SPECIES NAME AND DATE OF COLLECTION. HOLD CUTTINGS IN BUCKETS OF WATER FOR AT LEAST 8 HOURS AFTER COLLECTING.

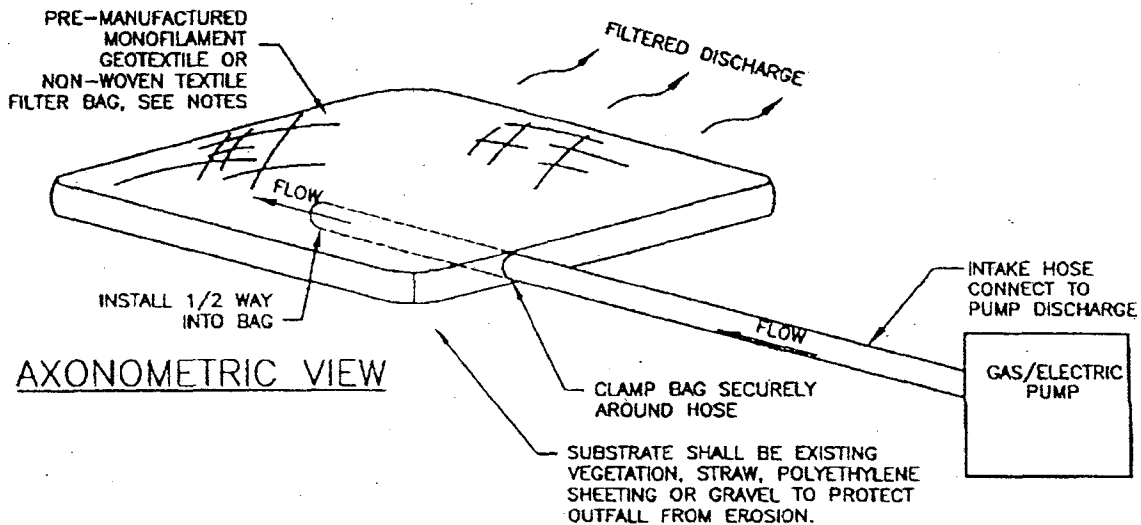
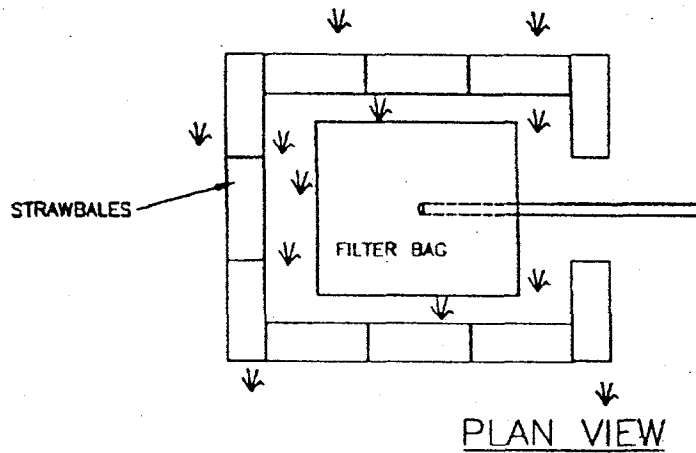


**WILLOW AND DOGWOOD STEM
CUTTING COLLECTION DETAIL**
NOT TO SCALE

RESTORATION PLAN

EXHIBIT 2

[Trash Pump and Filter Bag System]



NOTES

1. FILTER BAG SHALL BE SIZED TO ACCOMMODATE ACTUAL SEDIMENT LOAD CONDITIONS (I.E. VOLUME, TYPE OF SEDIMENT, ETC.) AT TIME OF CONSTRUCTION.
2. DRAIN FILTER BAG TO APPROVED RECEIVING AREA. MONITOR SYSTEM FREQUENTLY TO VERIFY ADEQUATE PERFORMANCE AND CONDITION OF FACILITIES.

TRASH PUMP AND FILTER BAG SYSTEM

NOT TO SCALE



United States v. Clarence Abeldgaard
No. A01-0378 Civ.
Photo No. 1
Pepper Road - - Violation Site 7L



United States v. Clarence Abeldgaard
No. A01-0378 Civ.
Photo No. 2
Pepper Road - - Violation Site 7L



United States v. Clarence Abeldgaard
No. A01-0378 Civ.
Photo No. 3
Pepper Road - - Violation Site 7L



United States v. Clarence Abeldgaard
No. A01-0378 Civ.
Photo No. 4
Sergeant Ave. Ext. - - Violation Site 6L



United States v. Clarence Abeldgaard
No. A01-0378 Civ.
Photo No. 5
Sergeant Ave. Ext. - - Violation Site 6L



United States v. Clarence Abeldgaard
No. A01-0378 Civ.
Photo No. 6
Sergeant Ave. Ext. - - Violation Site 6L



United States v. Clarence Abeldgaard
No. A01-0378 Civ.
Photo No. 7
Rowan Circle - - Violation Site 1L(b)

United States v. Clarence Abeldgaard
No. A01-0378 Civ.
Photo No. 8
Rowan Circle - - Violation Site 1L(b)





United States v. Clarence Abeldgaard
No. A01-0378 Civ.
Photo No. 9
Rowan Circle - - Violation Site 1L(b)



United States v. Clarence Abeldgaard
No. A01-0378 Civ.
Photo No. 10
Rowan Circle - - Violation Site 1L(b)

APPENDIX B - MAP OF LOTS 17, 18 AND 45

LEGEND

● TEST HOLE



UPLAND AREAS

LOT 17 3.012 AC.

LOT 18 1.035 AC.

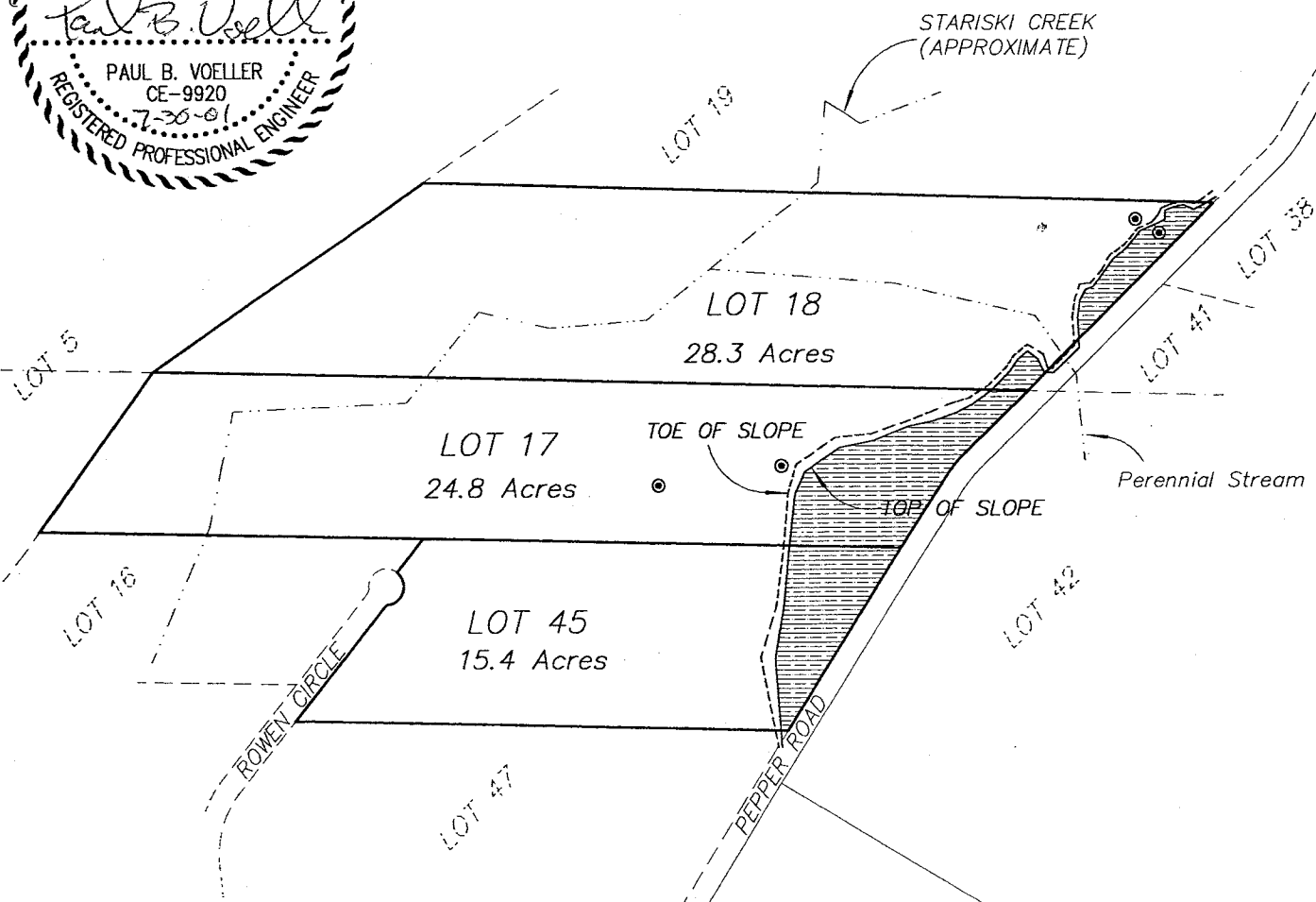
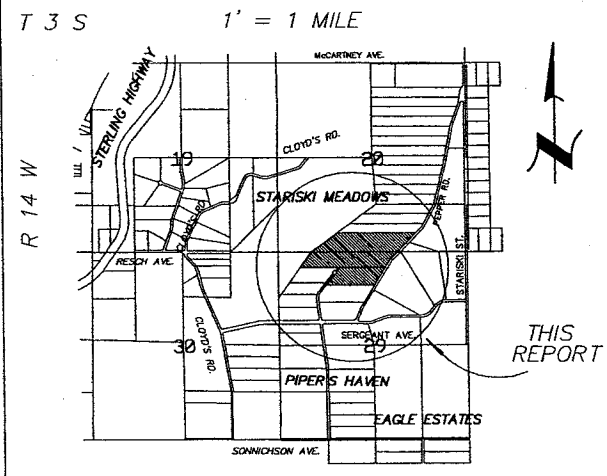
LOT 45 2.022 AC.

TOTAL 6.069 AC.



1" = 500'

VICINITY MAP



Job No: 492
Drawing: 492XY
Date: 07-28-01
Drawn by: pbv

Sheet 1 of 1

BORDERLINE

Engineers - Land Surveyors
Environmental Consultants
34601 Alamar Road
Anchor Point, Alaska 99556
(907)235-8078

SITE MAP STARISKI MEADOWS
Upland/Wetland Delineation Request
Lots 17, 18, & 45 Stariski Meadows
Twp. 3 South, Range 14 West, S.M. Alaska
Requested By: Cloyd Moser